IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-701

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Petitioners,

v.

WILFRED KEYES, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

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Statement of the Case

The judicial findings and determinations preceding this Court's prior opinion on the merits in this school desegregation litigation are amply set forth by the Court, 413 U.S. 189, at pp. 191-195.

We need not dwell upon the School Board's restatement of that history, since the legal significance of those events was fully settled by this Court's determination of that appeal. From those events this Court concluded that the School Board had been "found guilty of following a deliberate segregation policy" as to substantial portion of the school system. 413 U.S. at 199.

The proceedings in the district court after remand included a trial on the issue of district-wide violation under the principles set forth in Part II of this Court's opinion, 413 U.S. at pp. 198-205. The district court considered

whether there was any factual basis for finding the Park Hill area to be a unit separate, identifiable, or unrelated to the rest of the school district. On uncontested facts the trial court determined that Park Hill was indeed an integral part of the whole district.

Notwithstanding this finding as to Park Hill, the School Board contended that under this Court's mandate it was entitled to show that its acts of intentional segregation had no effect on schools outside the Park Hill area. The district court admitted and considered this evidence, ultimately holding it to be "merely conclusory and . . . lacking in substance." 368 F. Supp. 207 at 210; App. 280a.

On appeal the Tenth Circuit upheld these findings (521 F.2d 465, at 471-72; App. at 14a, 16a-19a), and the conclusion that Denver was an illegally segregated dual school system.

Contrary to the assertions of the School Board (Pet. at pp. 13-14, 17), neither of the courts below based its determination that Denver's was an illegally segregated dual *system* on a finding that the "Park Hill" segregation in the 1960's caused segregation in all the other schools throughout the district. That type of causal determination was rendered unnecessary by this Court's prior rejection of requiring proof as to segregation on a school by school basis. 413 U.S. at 200.

Nor, as asserted by the School Board, did the courts below base their conclusion on the assumption that this Court's opinion established a conclusive presumption of an illegal dual system in Denver. (Pet. pp. 13-14) Rather, the conclusion of a dual system was based upon the School Board's failure to prove Park Hill to be unrelated to the rest of the school district, and their failure of proof in rebutting the "common sense" presumption that their substantial segregatory acts had reciprocal effects outside of Park Hill. 413 U.S. at 203.

Having found Denver to be an illegally segregated school system, the district court ordered the parties to submit desegregation plans, ultimately adopting the pupil reassignment plan authored by its consultant. The trial court's plan required extensive preparation of pupils, faculty, administration and the community to ensure effective implementation of the decree and a smooth transition to a unitary system. That preparation proved effective, as the district-wide plan was implemented in September 1974 without incident and remains in effect today.

Those aspects of the district court's remedial plan about which the School Board here complains were affirmed by the court of appeals as an appropriate exercise of the district court's discretion in formulating an effective, district-wide faculty and pupil desegregation remedy. 521 F.2d at pp. 476-77, 484-85; App. at 32a-37a, 62a-65a.

In the courts below the School Board did not contest or litigate any issue relating to the district court's continuing jurisdiction over the implementation, adjustment or preservation of its remedial decree. In fact, under the issues remanded by the court of appeals the plan is not yet complete. Nor was there any issue raised below as to the trial court's relinquishment of jurisdiction.

REASONS FOR DENYING THE WRIT

I.

As to Violation, the Petition Presents No Substantial Legal Issues of General Applicability or Significance.

A. *At Most, the Violation Question Relates Only to the Application of This Court's Standards to the Particular Facts of the Denver School District.*

The School Board's quarrel with the application and interpretation of this Court's *Keyes* principles by the courts below relates merely to the application of those principles to Denver's particular facts. As it presents no issues of general applicability or significance, the Petition does not comport with the standards of Rule 19 of the Rules of this Court.

B. *The Petition Asserts No Conflict Among the Circuits in Applying Keyes Generally, and There Are None.*

The Petition does not rely upon any alleged conflicts among the circuit courts of appeals in either interpreting or applying this Court's decision in *Keyes*. Many such courts have now had occasion to consider *Keyes*,* and it is apparently being uniformly applied.

As must be apparent from their Petition, the essence of the School Board's appeal here is not disagreement with the lower courts' utilization of this Court's mandate, but with the mandate itself and its underlying opinion. The

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* See, for example, *United States* v. *School District of Omaha*, 521 F.2d 530 (8th Cir. 1975), *cert. den.*, —— U.S. ——; *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963; *Oliver* v. *Michigan State Board of Ed.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963; *Brinkman* v. *Gilligan*, 503 F.2d 684 (6th Cir. 1974); *Johnson* v. *San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974).

School Board's collateral attack begins upon this Court's prior determination that the quantum of proven illegal segregation was substantial, and continues through disagreement with this Court's rejection of the school by school approach to both violation and remedy. Again, the School Board's Petition fails to meet Rule 19's standards.

C. *The Courts Below Properly Decided That Denver Was An Illegally Segregated School System.*

1. The Controlling Factual Issue Remanded Was Conceded by the School Board.

In Part II of its prior opinion, this Court determined that proven intentional segregation in Denver affected "a substantial portion of the students, schools, teachers and facilities." 413 U.S. 201. In view of the substantial nature of this systematic discrimination, this Court rejected the Board's contention that plaintiffs "must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system." *Id.* at 200. The Court concluded that this proven substantial state-imposed segregation

> will suffice to support a finding by the trial court of the existence of a dual system. *Id.* at 203.

The only factual issue remanded was whether Denver presented one of the "rare" instances

> in which the geographical structure of, or the natural boundaries within, a school district [has] the effect of dividing the district into separate, identifiable and unrelated units. *Id.* at 203.

This Court was also aware that the School Board's task of establishing the separateness would be difficult:

> We observe that on the record now before us there is indication that Denver is not a school district which

might be divided into separate, identifiable and unrelated units. *Id.* at 203.

On remand, the School Board, as noted in its Petition, p. 6, n. 11, did not even attempt to prove that the Park Hill area was separate or unrelated, conceding it was not. The plaintiffs introduced uncontroverted evidence demonstrating that Park Hill was an integral part of the school district. This evidence considered geography, structure, school organization, public transportation, police, fire and other municipal services, political, zoning and a multiplicity of other relationships firmly linking Park Hill with the rest of the school district. The district court therefore determined that Park Hill was not a separate, identifiable or unrelated unit of the school district. 368 F. Supp. at 209-10; App. at 277a-78a.

Plaintiffs contended that once the trial court determined that Park Hill was not separate, it inexorably followed from this Court's mandate that Denver was a dual school system. We still maintain that this is a correct reading of this Court's opinion.

Nevertheless, the School Board insisted that it had a right to attempt to rebut the "common sense" conclusion

> . . . that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. *Id.* at 203.

The School Board thereupon introduced evidence attempting to prove that its intentional segregatory acts had no impact beyond the Park Hill schools. It asserted that if it could prove this lack of "extraterritorial effect," then the trial court could not conclude that Denver was a dual system. We believe this issue to have been settled by this Court's determination of the substantial nature of proven

Denver discrimination and by its rejection of the need for proving *de jure* segregation in every school. Yet, if the Board's theory were accepted under Part II, it would then be necessary to consider the issues remanded under Part III of this Court's opinion as to the "core city" schools. 413 U.S. at pp. 205-213.

2. Both Courts Below, in Considering and Reviewing the School Board's Evidence About Extraterritorial Effect, Found It Unconvincing.

The district court considered all of the School Board's evidence relevant to their assertion that their segregatory actions had no extraterritorial effect outside of Park Hill. That evidence consisted mainly of the testimony of a statistician who attempted to demonstrate the lack of effect through statistical studies.

After considering the evidence the district judge concluded:

> We have fully considered all of this evidence presented by defendants, both that offered in this hearing and all evidence of record from previous proceedings in this case. Insofar as that evidence was offered to support defendants' contention that the Denver school district is not a dual system, we conclude that it is merely conclusory and is lacking in substance. The intended thrust of that evidence has been that segregated conditions in individual schools outside the Park Hill area are wholly the product of external factors such as demographic trends and housing patterns, and are in no way the product of any acts or omissions by defendants. We are not persuaded by the evidence presented, nor have defendants succeeded in dispelling the presumption that the segregative intent of the School Board was clearly evidenced by its actions in

Park Hill permeating the entire district. The affirmative evidence is to the contrary, that defendants' actions in Park Hill are reflective of its attitude toward the school system generally.

The Supreme Court's viewpoint based on the record before it is that the Denver school system is a dual system. There can be no doubt as to its view of the case in the absence of new and cogent evidence. 368 F. Supp. at 210; App. 280a-81a.

The court of appeals carefully reviewed the record and had no difficulty affirming the trial court's determination. It noted that plaintiffs' evidence afforded three separate bases for disbelieving the School Board's evidence. 521 F.2d at 472; App. 17a-18a. The appellate court stated:

> On the basis of our review of the record, we cannot say that the trial court erred either in choosing to disbelieve the School Board's evidence or in concluding that the Board failed to overcome plaintiffs' prima facie case establishing the existence of a dual system in Denver. 521 F.2d at 472; App. 18a.

Thus contrary to the School Board's assertions the proceedings below not only followed this Court's explicit instructions as to the factual issue of the separateness of Park Hill, but also fully considered (unnecessarily, we assert) and rejected on its merits the Board's assertions regarding the absence of extraterritorial effect. This was not the result of the courts below applying an erroneous standard of proof, as asserted by the Board (Pet. 16, 17), but rather of the basically unconvincing nature of the board's evidence.

3. The Petition Misstates the Holdings of the Courts Below and Is Inconsistent With This Court's Prior Decision.

To the extent that the School Board implies that the courts below determined Denver to be a dual system because they thought that the "Park Hill" acts of intentional segregation caused *all* of the current segregation in Denver's schools, the assertion is patently ridiculous. It is obvious that segregatory acts in the 1960's could not have "caused" earlier segregation in the core city schools.

It is equally obvious that under this Court's prior opinion, no such findings were either required or appropriate as this type of causation analysis leads inexorably back to the school-by-school approach to violation explicitly rejected by this Court. 413 U.S. at 200.

In fact, the Board's entire "extraterritorial effect" theory was but another attempt to invoke the school-by-school approach to violation, rather than the system-wide approach approved here in *Keyes*.

The School Board's efforts, both in the courts below and here attempt to collaterally attack and relitigate matters settled by this Court's prior decision, including the determination that proven segregation in Denver was substantial.

Despite the School Board's protests it is clear that the results below are entirely in accord with this Court's prior opinion. As contemplated, the Board was unable to show that Park Hill was separate. And as authorized, the trial court then held Denver to be an illegally segregated dual system. That conclusion led the trial court, again as contemplated here, to require district-wide desegregation.

II.

As to the Scope of the Denver Remedy, the Petition Seeks to Relitigate Issues Determined by This Court's Prior Opinion.

A. *Denver's Asserted "Duality With a Difference" Has Already Been Rejected by This Court.*

The essence of the Board's complaint is that Denver is a "dual system with a difference," and that the remedy should therefore be "limited to those schools in the system which were affected by the acts in Park Hill in the 1960's." Pet. at pp. 20, 21.

The Board makes this assertion in the face of this Court's prior determination rejecting the legal significance of the alleged "difference":

> Of course, where that finding [of a "constructive" dual system] is made, as in cases involving statutory ["pure"] dual systems, the school authorities have an affirmative duty "to effectuate a transition to a racially nondiscriminatory system." 413 U.S. at 203.

And the Board ignores this Court's mandate that upon a determination of Denver to be a dual system,

> respondent School Board has the affirmative duty to desegregate the *entire system* "root and branch." 413 U.S. at 213 (emphasis added).

Those pronouncements were made in the course of rejecting the same argument that the Board again attempts to rekindle here; that all particular violations had already been remedied, that the "scope of the violation determines the scope of the remedy," and hence no further desegregation was required beyond the four schools already desegregated by district court order.

B. *The Board's Proposed Remedy Formulation Resurrects the School-by-School Approach as to the Scope of the Remedy.*

Similarly, in disregard of this Court's rejection of the school-by-school approach as to violation, 413 U.S. at 200, the Board seeks here to reassert that approach to limit the scope of the remedy.

Neither of the courts below had any difficulty discerning or dealing with this collateral attack upon the law of this case. As the court of appeals stated:

> Whether a school system is illegally segregated by reason of statutory separation of the races or by reason of past segregative acts of school authorities, the scope of the remedy must in either case be system-wide. 521 F.2d at 476; App. 32a-33a.

Not only would the Board's causation formulation require a school-by-school determination, its limitation to schools "affected by the acts in Park Hill in the 1960's" would automatically prevent desegregation of the core city schools, which constitute nearly all of the minority segregated schools remaining after the trial court's 1969 preliminary injunction.

III.

As to the Other Components of the Remedial Order, the Petition Raises No New or Substantial Issues.

A. *The Trial Court Adopted the Board's Own Proposals As to An Affirmative Action Plan for the Recruitment of Additional Minority Teachers.*

In 1969, black and Chicano teachers were 7% and 2% of the district's faculty. By 1973, only 9% of the teachers were black, and less than 4% of them were Chicano. Even by 1973 there were only 520 black and Chicano teachers compared to 3,500 Anglo teachers (PX 921, 922B, 923). And minority teachers were still concentrated in minority schools. See 521 F.2d at 484, n. 23.

The School Board's own remedial proposal not only recognized the need for faculty desegregation but also proposed an affirmative action plan for the recruitment of additional minority teachers. The district court essentially adopted this aspect of the Board's plan:

> The ordered recruitment program for minority personnel is in substance the recruitment program contained in the School District's own desegregation plan as submitted to the court. Although the District's proposal failed to state its recruitment goals, Denver's superintendent of schools testified at trial that the District's affirmative action program would aim at achieving a racial-ethnic composition among professional staff that approximates the composition of the students in the District. We believe that the court's faculty and staff desegregation orders were proper and we affirm. 521 F.2d 483-84; App. 64a-65a.

The appellate court also properly characterized this component as "measures to ensure faculty desegregation" (521

F.2d at 483; App. 64a), in view of the low number and percentage of minority faculty members.

Effective faculty desegregation has long been considered by this Court as an important component of conversion to a nondiscriminatory system, and presents no new issue here. *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225; *Bradley* v. *School Bd. of City of Richmond*, 382 U.S. 103; *Rogers* v. *Paul*, 382 U.S. 198.

B. *There Is No Factual or Legal Basis for the Contention That the District Court Erroneously Employed Racial Ratios in Assigning Students.*

The district judge was well aware of *Swann's* proscription against "rigid adherence to percentage figures." 380 F. Supp. 686, App. 170a-171a. He employed the ratio as "guidelines only" in adopting a student assignment plan which allowed a variety of resulting racial composition in the desegregated schools ranging from 40% to 80% Anglo. Thus there was no rigid requirement that all schools reflect the first racial composition of the school community, and the court of appeals affirmed, 521 F.2d at 477; App. 35a.

C. *None of the Issues Involved in the Pasadena Case Were Litigated Below.*

As an obvious afterthought following this Court's granting of certiorari in the Pasadena case, *Spangler* v. *Pasadena City Board of Education*, 519 F.2d 430 (9th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3279 (No. 75-164, Nov. 11, 1975), the School Board attempts to contest the possible future alteration of the decree under the district court's exercise of its continuing jurisdiction.

Unlike the situation in *Pasadena*, the School Board here has neither raised nor litigated below any issue relating to the trial court's continuing jurisdiction.

with English language handicaps. Although the trial court cited language deficiencies as one of the obstacles which bilingual-bicultural compensatory educational programs address, it described other obstacles which justified adopting these programs. For example, the Court of Appeals disregarded the trial court's reliance on Dr. Cardenas' testimony respecting the isolation of Hispanic students by virtue of the school system's orientation. 380 F. Supp. at 694-695. Effecting a change in that orientation by implementing bilingual-bicultural programs would, according to the testimony relied on by the District Court, facilitate the realization of non-discriminatory education.

Thus, the District Court in Denver as well as other courts (See p. 11 supra) were persuaded by the substantial testimony of educators that effective integration of the schools of a tri-ethnic community, consistent with the standards established by this Court, necessitated the introduction of bilingual-bicultural compensatory programs for a wide variety of students, including those who do not suffer from English language difficulties. By overturning this exercise of equitable power, particularly by substituting its view of the purpose of bilingual-bicultural compensatory education for that of the trial court's, the Court of Appeals has ignored the teachings of Brown II and the litany of cases which followed.

CONCLUSION

The decision of the Tenth Circuit raises important questions concerning a district court's power to adopt compensatory programs for Hispanic school children to remove obstacles to thorough and prompt desegregation. As desegregation continues to move North into tri-ethnic cities, it is imperative that the equitable authority of district courts which has been limited and obscured by the Tenth Circuit is clarified.

The Petition for Writ of Certiorari should be granted.

Dated: November 13, 1975

Respectfully submitted,

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